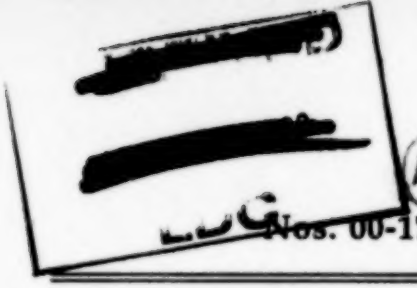

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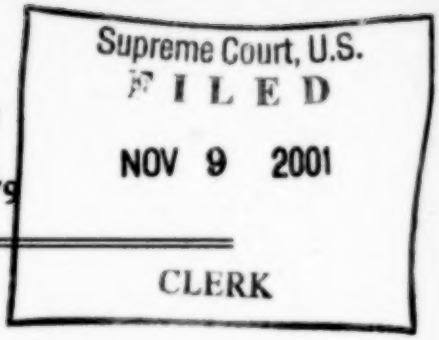

In The

Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent of Public Instruction, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

And Related Cases

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, FAMILY RESEARCH COUNCIL, INC., AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONERS

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STATEMENTS OF INTEREST OF *AMICI CURIAE*

Detailed statements of interest of *Amici* are set forth in the Appendix. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.[1]

STATEMENT OF THE CASE

Amici adopt the Statements of the Case in the Briefs of Petitioners.

SUMMARY OF ARGUMENT

Under existing precedent and underlying constitutional policy, the Ohio Pilot Scholarship Program does not violate the Establishment Clause. Contrary to the Court of Appeals' conclusion, the Program is neutral: it defines the class of beneficiaries without reference to religion, and those beneficiaries possess genuine choice about where to redeem their scholarships. The fact that a majority of beneficiaries decided to direct their scholarships to religious schools does not make the Program non-neutral.

The no-funding doctrine does not control the outcome of this case. To the extent that a particular case appears to pit the no-funding and neutrality doctrines against one another, the substantive neutrality principle is the key to resolving the apparent conflict. Under that

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[1] Pursuant to Rule 37.6, *Amici* disclose that: (1) no counsel for a party authored this brief, in whole or in part; and (2) no person or entity has made a monetary contribution to the preparation or submission of this brief.

principle, the purpose of the Religion Clauses is to minimize government influence on religious choices. Further, the history underlying the no-funding doctrine compels a relatively narrow application of the doctrine, and such narrow interpretation of the doctrine would reduce the number of conflicts between that doctrine and the neutrality doctrine. In any event, the existence of independent private choice in this case dictates the Program not be invalidated under the no-funding doctrine.

This Court's decision in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), does not require invalidation of the Program, for the Program is different than the aid mechanism invalidated in that case. To the extent that *Nyquist* controls, it should be overruled, given its inconsistency with other precedents.

ARGUMENT

I. The Pilot Scholarship Program is Religiously Neutral.

Of those parents who elected to place their children in the Pilot Scholarship Program, a substantial majority chose to redeem their scholarships at private religious schools. Drawing an unwarranted inference from this fact, the appeals court concluded that the Program is not neutral.

The Program is religiously neutral in a variety of ways. First, all Cleveland children are eligible for scholarships, without regard to their religious affiliations. Second, Cleveland parents eligible to participate in the Program have a range of educational options, including secular ones. Third, in the absence of improper government conduct, how parents ultimately exercise their freedom of choice is not relevant to the Establishment Clause analysis.

A. The Program Defines its Beneficiaries Without Reference to Religion.

In concluding that the Program is not neutral, the appeals court focused upon the identity of schools accepting vouchers rather than the identity of the families eligible to receive vouchers. That all Cleveland children – without regard to their religious affiliation – are eligible for scholarships should not be overlooked.

The Program provides scholarships to district children in kindergarten through eighth grade. Ohio Rev. Code § 3313.975(C)(1). The Program gives a preference to low-income children, offering scholarships to wealthier children only if all poor students have received consideration. *Id.* at § 3313.978(A). The religion of children or their families plays no role in determining eligibility for scholarships.

B. A Range of Choices are Available to Cleveland Parents.

In concluding that the Program was not neutral, the Sixth Circuit intimated that the legislature had cleverly "rigged" the Program so that parents would choose religious schools, despite the facial neutrality of the statutory provisions creating the Program. The legislature allegedly accomplished this nefarious objective by: (1) limiting the dollar amount of scholarships; and (2) requiring schools to "opt in" to the Program. The appeals court contended that these features of the Program skewed the Program towards participation by religious schools.

In reality, because the Program operates within the context of all public school options, parents of students in the Cleveland school district have a number of options. First, they can keep their children in the public schools to

which they normally would be assigned (and receive tutorial assistance under the Program). Second, parents can choose to send their children to community (charter) schools. Third, parents may redeem vouchers at private secular schools participating in the program. Fourth, parents may direct scholarships to neighboring public schools that elect to participate in the program. Fifth, parents may choose to send their children to private religious schools.

Program opponents have not provided any evidence to demonstrate that the participation level results not from the actual preferences of Cleveland families but from subtle government influence.[2] To the contrary, the

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[2] The Court of Appeals cited a law review article for the proposition that the Program tuition limits favor religious schools because such schools have lower overhead costs and receive supplemental income from private donations. *Simmons-Harris v. Zelman*, 234 F.3d 945, 959 (6th Cir. 2000) (citing Martha Minnow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262 (1999)). However, the cited article provides no factual support for its assertions that (i) voucher funding levels typically approximate tuition levels set by religious schools and (ii) secular private schools do not receive private donations. Likewise, the Court of Appeals' reference to an "incentive for private nonsectarian schools to participate in the community schools program rather than in the school voucher program," *id.*, is irrelevant. Parents can select such a school regardless of whether it chooses to be a community school or a private school participating in the Program. If anything, such an incentive would influence parents toward secular schools since community schools do not charge tuition and religious schools are not eligible to be community schools. Ohio Rev. Code § 3314.03(A)(11)(c). The court's comparison to the community schools program does acknowledge, though, that the Program must be evaluated in its context. *See also*, Ohio Rev. Code § 3314.11 (creating a state office of school options to provide advice and services for both the community schools program and the pilot project scholarship program).

record indicates that "not one [secular private school] has ever turned away a voucher applicant for any reason." *Simmons-Harris v. Zelman*, 234 F.3d 945, 969 (Ryan, J., dissenting). To conclude from the record that parents wishing to select a secular alternative school were unable to do so is mere speculation.

C. The Choices Made by Cleveland's Parents Do Not Prove Non-Neutrality.

The Establishment Clause is not violated where a substantial portion of individual beneficiaries under a neutral program allowing true private choice choose to direct their aid to religious organizations. When that happens, any effect of advancing religion is attributable solely to private citizens and not to the government.

In *Mueller v. Allen*, 463 U.S. 388 (1983), this Court declined to consider the allocation of tax benefits arising under the tax deduction scheme, even though evidence indicated that private school tuition constituted the vast majority of deductible expenses and 96% of the private school students attended religiously affiliated institutions. *Mueller*, 463 U.S. at 401. This Court stated that:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.

Id.

In *Witters v. Washington Department of Services*, the opinion of the Court discusses, as a factor supporting the program, the fact that "nothing in the record indicate[d] that . . . any significant portion of the aid expended under the . . . program as a whole will end up flowing to religious education." 474 U.S. 481, 488 (1986). However, a total of five justices in concurring opinions suggested directly or indirectly that this factor was irrelevant to their conclusion, because the program could be upheld under *Mueller*. *Id.* at 490 (White, J., concurring); *Id.* (Powell, J., concurring); *Id.* at 493 (O'Connor, J., concurring). As Justice Powell stated, "[c]ontrary to the Court's suggestion, . . . this conclusion does not depend on the fact that petitioner appears to be the only handicapped student who has sought to use his assistance to pursue religious training." *Id.* at 491 n.3; *see also, Agostini v. Felton*, 521 U.S. 203, 229 (1997) (refusing to "conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid.").

To suggest that the government must structure aid programs to deter beneficiaries from making religious choices contradicts the fundamental Establishment Clause principle of maximizing religious liberty. Such deterrence of religious choices would likely violate the specific Establishment Clause ban on government inhibition of religion, and manipulating an aid program to limit the number of individuals exercising religious choices might run afoul of the ban on excessive government entanglement with religion.

II. The No-Funding Doctrine Does Not Control the Outcome of this Case.

A. The Conflicting Doctrines.

This case lies at the intersection of two familiar doctrines from the American tradition of religious liberty. The neutrality doctrine directs that government be neutral toward religion, *see, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 592-94 (1989); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 745-47 (1976) (plurality opinion); *Abington School Dist. v. Schempp*, 374 U.S. 203, 215, 222, 225-26 (1963); *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947), neither "advanc[ing] nor inhibit[ing]" religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Government may not endorse religion, but neither may it "disapprove" religion, *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985), quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring), or endorse the view that religion is wrong-headed or irrelevant. A second doctrine, equally familiar, is the no-funding doctrine: government generally should not fund religious activities. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971); *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947). Government may sometimes fund secular activities performed by religious organizations,[3] but those cases are no precedent for funding religious activities.

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[3] *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 608-09 (1988) (sex education); *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 657-59 (1980) (administration of mandatory testing and monitoring of student attendance); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (cash grants to colleges and universities); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (medical care).

The neutrality and no-funding doctrines have generally seemed to be consistent, and the Court has only occasionally been forced to choose between them. When the Court has been forced to choose, such as in *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995), *Witters* and *Mueller*, the neutrality doctrine has prevailed. Somewhat analogously, the Court has held that property committed to religious uses may be exempted from taxation pursuant to a neutral scheme of tax exemption for a wide range of secular and religious organizations. *Walz v. Tax Comm'n*, 397 U.S. 664, 672-73 (1970). And there has never been a successful Establishment Clause challenge to the income-tax deductibility of contributions to religious organizations. These deductions are not mere tax exemptions; they offset tax that would be due on the taxpayer's salary and investment income. They are therefore like a matching grant to the taxpayer for every contribution. The justification must be that religious contributions are neutrally included in a broad range of contributions to analogous organizations, and that the neutrality doctrine controls over the no-funding doctrine.

Here the two doctrines again conflict. The Ohio Scholarship Program enables parents to select religious schools. The neutrality doctrine forbids the discriminatory exclusion of religious schools. But opponents of the Program argue, and the Court of Appeals held, that including religious schools violates the no-funding doctrine.

The ultimate question presented is thus to define the relationship between these conflicting doctrines in the context of publicly funded education. Is the neutrality doctrine subordinate to the no-funding doctrine, as the Court of Appeals assumed? Or is it the other way around,

as this Court has held in other contexts? Or is there some underlying principle that unites these doctrines and makes their relationship clear?

B. Substantive Neutrality: Maximizing Religious Liberty by Minimizing Government Influence.

There is such an underlying principle. The ultimate goal of the Religion Clauses is religious liberty for all in a pluralistic society – for believer and nonbeliever, for Christian and Jew, for Protestant and Catholic, for Western traditions and Eastern, for large faiths and small, for atheist and agnostic, for secular humanist and the religiously indifferent, for every individual human being in the vast mosaic that makes up the American people. The ultimate goal is that every American should be free to hold his or her own views on religious questions, and to live the life that those views direct, with a minimum of government interference or influence.

The neutrality doctrine serves this ultimate goal most directly. By forbidding government to take positions on religious questions, the neutrality doctrine minimizes government influence on religious choice, and thus leaves maximum room for private influence and private choice.

The no-funding doctrine serves this ultimate goal instrumentally. Government money is a powerful source of government influence; government expenditures on religion generally expand government influence in a field where that influence should be minimized. Describing the same point from the private perspective, voluntary funding of religious organizations generally maximizes individual liberty and the influence of private choice. Each individual can decide when, how, and how much to

contribute to whom, and whether to contribute at all. Voluntary funding of religious organizations protects individual conscience and keeps government out of religion.

These themes of liberty, neutrality, and private choice can be integrated into a single standard of substantive neutrality:

> [S]ubstantive neutrality [means] this: the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance. . . . [R]eligion should be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. . . .
>
> This elaboration highlights the connections among religious neutrality, religious autonomy, and religious voluntarism. Government must be neutral so that religious belief and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized. The same is true of religious practice and refusal to practice. The goal of maximum religious liberty can help identify the baseline from which to measure encouragement and discouragement.[4]

This elaboration of substantive neutrality synthesizes seemingly separate strands in the American tradition of religious liberty. It attempts to clarify this Court's traditional emphasis on neutrality, to defend that emphasis

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[4] Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001-02 (1990).

against academic critics,[5] and to show how neutrality relates to liberty and to private choices. This synthesis points the way to a principled resolution here, where each side relies on a different strand from the religious liberty tradition.

The ultimate goal is to maximize religious liberty for believers and nonbelievers alike in a pluralistic society. The no-funding doctrine is instrumental – it serves religious liberty under a limited range of circumstances. But these circumstances do not encompass the Ohio Scholarship Program.

C. The Historical Origins of the No-Funding Principle Do Not Warrant Invalidation of the Program.

The no-funding doctrine looms large in the American tradition of religious liberty because of two historical controversies of great importance. These controversies are a source of understanding of the doctrine's scope and rationale.[6]

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[5] *See, e.g.*, Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266 (1987). Professor Smith urged the Court to abandon "the illusion that substantive answers can be deduced from the formal idea of neutrality." *Id.* at 331-32. Substantive neutrality moves beyond a mere "formal idea"; it defines "neutrality" in terms of the underlying substantive policies of the Religion Clauses.

[6] The following historical discussion initially appeared in the brief *amici curiae* of Christian Legal Society, *et al.*, filed with this Court in the *Rosenberger* case and authored by Douglas Laycock. Professor Laycock subsequently published this discussion in substantially the same form. *See* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43, 48-53 (1997).

1. The Virginia General Assessment Bill Differs Fundamentally from the Ohio Scholarship Program.

Financing of churches (as opposed to schools) was the central church-state issue of the 1780s, and the immediate background to the adoption of the Establishment Clause in 1791. The single most famous American statement on disestablishment, James Madison's *Memorial and Remonstrance Against Religious Assessments*, was written in opposition to the general assessment bill in the Virginia legislature, which would have provided tax support for teachers of the Christian religion.[7] If history settles anything in this area, it is that such a general assessment would be unconstitutional.

But this case is not about such a general assessment; indeed, nothing like the Virginia general assessment bill has been seriously proposed since repeal of the Massachusetts establishment in 1833. In the typical modern dispute about funding religious organizations, the state claims that it is funding some secular activity performed by a religious organization; those who object to funding claim that the activity to be funded is actually religious or that the secular activity is insufficiently insulated from religious activities. Notwithstanding the disputed characterization of the funded activity, modern funding programs are never limited to religious organizations.

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[7] Both the *Memorial and Remonstrance* and the general assessment bill are reprinted in *Everson v. Board of Education*, 330 U.S. 1, 63-74 (1947) (appendix to opinion of Rutledge, J., dissenting).

In sharp contrast, the Virginia general assessment bill was a tax solely for the support of clergy in the performance of their exclusively religious activities. The assessment was "general" only in the sense that all Christian faiths were included. There were no significant numbers of non-Christians in the polity, so the assessment was effectively neutral among religions then represented in Virginia.

However, it was not neutral as between religion and non-religion. The reason for supporting exclusively religious activities was not that they fell within the neutrally-drawn boundaries of some larger category of activities to be supported by the state. Rather, religion was to be singled out for special support because the state deemed it to be of special value. Put differently, the Virginia general assessment bill proposed to finance religious indoctrination because it was religious indoctrination. Under the Virginia general assessment, the religious content of the funded activity would have comprised the basis for qualifying for funding. The government would have been charged to fund exclusively religious activity with the intent that religious indoctrination be the outcome of such funding. In short, the government would have been directly engaged in influencing the religious choices of its citizens.

By contrast, the Ohio Scholarship Program is about financing accredited education regardless of its religious content. The State has determined to fund educational activity and intends for accredited education to be the outcome of the funding. Institutions may participate in the Program based on their accredited educational programs. The State is indifferent to the religious content of

the educational experience, and any religious content results solely from the private choices of the parents.

2. The Protestant-Catholic Conflict Was Not Grounded In An Establishment Clause Principle.

The other great controversy that gave prominence to the no-funding doctrine was the nineteenth-century dispute over common schools. Over a period of decades, and amidst great controversy, Americans built up the public schools and withdrew funding from religious schools.[8] Thirty-two states adopted constitutional provisions expressly prohibiting public funding of religious schools.[9]

This controversy, the details of which have been largely forgotten, is the source of the tradition that school funding is an especially important issue in the separation of church and state. And the continuing disputes over that issue are a principal source of the sense that direct monetary subsidization of religion is a different breed of

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[8] For accounts of these developments and the associated controversies, *see* Charles Glenn, *The Myth of the Common School* (Univ. of Mass. Press 1988); James Hennesey, *American Catholics: A History of the Roman Catholic Community in the United States* 182-83, 185-86 (Oxford Univ. Press 1981); Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society 1780-1860* (Hill & Wang 1983); Diane Ravitch, *The Great School Wars* 3-76 (Basic Books 1974); Anson Phelps Stokes, 2 *Church and State in the United States* 47-72, 642-54, 681-86, 722-28 (Harper Bros. 1950).

[9] For a list, *see* Carl Zollman, *American Church Law* Secs. 65-66 at 78-80 (West 2d ed. 1933). For additional background, *see* Glenn, *supra* note 8, at 251-53. For examples, *see* Cal. Const. art. IX, § 8; N.Y. Const. art. XI, § 3; Tex. Const. art. 7, § 5(a).

problem, distinguishable from access to facilities and other rights subject to the neutrality doctrine.

The nineteenth-century resolution of the school-funding controversy arguably represents a political judgment on the constitutional questions raised by such funding. But this Court should not rely on that political judgment, even with respect to schools. It is especially dangerous to abstract from that judgment a bright-line rule that applies to all contexts and overrides more fundamental principles of religious neutrality. It is dangerous to apply doctrines derived from a political dispute without examining the dispute and the doctrines.

One difficulty with reasoning from nineteenth-century rejection of funding for religious schools is that that rejection was not part of the background to the First Amendment. And although the movement against funding religious schools amended many state constitutions, it conspicuously failed in its attempt to amend the federal Constitution (see below). The mere fact that the movement attempted to amend the federal constitution indicates that there was at least some doubt as to the extent to which the Establishment Clause prohibited funding of religious schools.

Perhaps more important, the nineteenth-century movement was based in part on premises that were utterly inconsistent with the First Amendment. Although there were good arguments to be made on both sides, the nineteenth-century opposition to funding religious schools drew heavily on anti-Catholicism. Nativist opposition to Catholic immigration fluctuated after 1825, but it never disappeared. Anti-Catholic secret societies, such as

the Know Nothings and the American Protective Association, occasionally grew large enough to influence elections,[10] and there was occasional mob violence and burnings of Catholic churches and convents.[11]

The movement for a federal constitutional amendment began with President Grant's 1875 warning against a potential national conflict "between patriotism and intelligence on the one side, and superstition, ambition and ignorance on the other."[12] In context, there is no doubt that the feared source of "superstition, ambition and ignorance" was the Roman Catholic Church, rapidly growing from immigration, with its alleged papal conspiracy to dominate the country. The preventive that the President proposed was to "[e]ncourage free schools and resolve that not one dollar of money appropriated to their support, no matter how raised, shall be appropriated to the support of any sectarian school."[13] Catholics argued that Protestant religious practices in the public schools

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[10] *See, e.g.*, David H. Bennett, *The Party of Fear* 105-16, 159-82 (Univ. of N. Carolina Press 1988); Donald L. Kinzer, *An Episode in Anti-Catholicism: The American Protective Association* 140-80 (Univ. of Washington Press 1964); 1 Stokes, *supra* note 8, at 825-38.

[11] Kaestle, *supra* note 8, at 170; Ravitch, *supra* note 8, at 36, 66, 75; 1 Stokes, *supra* note 8, at 817-22, 824, 830-31.

[12] Speech to the Army of the Tennessee (Sept. 29, 1875) (manuscript and typescript in the Ulysses S. Grant Papers in the Library of Congress; reproduced on reel 5 of the microfilm edition).

[13] *Id.* The President requested a constitutional amendment to this effect in his Annual Message to Congress (Dec. 7, 1875), reprinted in James D. Richardson, 7 *Messages and Papers of the Presidents* 332, 334 (1898).

made those schools as sectarian as any private school. Public schools commonly read the King James Bible ("the Protestant Bible") "without note or comment."[14]

Catholics noted that "the reading of the Scriptures as a public ceremony is as distinctive to them [Protestants], as the celebration of Mass would be to Catholics."[15]

Senator James G. Blaine proposed a constitutional amendment to implement the President's proposal. The Blaine Amendment would have codified the Protestant position by expressly permitting Bible reading in the public schools but forbidding any use of state or federal funds to support religious schools.[16] This amendment was narrowly defeated by Democrats in the Senate; one of Blaine's supporters later denounced the Democrats as "the party of Rum, Romanism, and Rebellion."[17]

Whatever the merits of the tradition against state funding for church-affiliated schools, its origin was not a proud moment in our constitutional history. These nineteenth-century debates did not produce a principled resolution to a difficult problem. Badly tainted by anti-Catholicism, they produced instead a Nativist Protestant

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[14] For accounts of the Protestant Bible controversy, *see* Glenn, *supra* note 8, at 196-204; Kaestle, *supra* note 8, at 98-99, 166-71; Ravitch, *supra* note 8, at 3-76; 1 Stokes, *supra* note 8, at 825-32.

[15] *The President's Speech at Des Moines*, 22 Catholic World 433, 438 (1876).

[16] For the text of the amendment with discussion, *see* Glenn, *supra* note 8, at 252-53; 2 Stokes, *supra* note 8, at 68-69, 722-28; Zollman, *supra* note 9, Sec. 62 at 75-76.

[17] See Arthur Schlesinger, ed., *History of American Presidential Elections 1789-1968* at 1606 (Chelsea House 1971).

victory over Catholic immigrants. There was only a pretense of neutrality; the end result sustained a Protestant establishment in the public schools at public expense, with no relief for religious minorities. Major Jewish groups responded with their long effort to secularize the public schools;[18] Catholics continued their long effort to build and finance private schools.

The position of opponents of the Ohio Scholarship Program, regardless of their underlying motives, is analytically analogous to the position of the nineteenth-century Nativist Protestants. Of course, the opponents perceive their position to be far more inclusive, but they make the same analytical error with respect to the religious schools they seek to exclude. The opponents believe that excluding religious schools from the program would be neutral and fail to realize that such exclusion may in fact constitute discrimination against religious viewpoints in education and against the religious liberty interests of parents and their children. Such discrimination would violate the State's obligation of substantive neutrality toward religion. This Court should not unwittingly apply a doctrine rooted not in fundamental Establishment Clause principles but in nineteenth-century anti-Catholicism.

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[18] See Jonathan D. Sarna, *American Jews and Church-State Relations* 14-31 (American Jewish Committee 1989)

3. As an Application of the Substantive Neutrality Principle, the No-Funding Doctrine Should be Narrowly Construed.

Because government at all levels plays an active role in our society, there will arise many different issues concerning neutrality and funding, and different factual contexts will require different solutions. This Court must reason such issues out from first principles and we have tried to assist that process by articulating the fundamental principle of the Establishment Clause: to maximize religious liberty in a pluralistic society by minimizing the influence of government on the religious choices of private individuals. We have also discussed how the no-funding doctrine implements (or fails to implement) this principle in the two historical controversies from which the doctrine emerged.

Proponents of the Virginia general assessment sought to fund exclusively religious education because of its religious content. In other words, they wished to use the power of the State specifically to influence citizens in favor of the Christian religion. In an era of minimal government, religious indoctrination was to be singled out for a special subsidy. The no-funding doctrine as applied to the Virginia general assessment was fully consistent with the substantive neutrality principle.

In the Nativist Protestant movement, the State sought to exclude funding from any educational program that had Catholic religious backing (while advancing Protestant religion in the public schools). Put differently, the movement specifically sought to use the power of the State to influence citizens against the Catholic religion. In

this context, use of the no-funding doctrine actually contradicted the substantive neutrality principle and undermined pluralism.

In the Ohio Scholarship Program, the State is seeking to fund educational options selected by parents and students, regardless of any religious content to the options. The State is not seeking to influence citizens for or against any particular religion or denomination. Rather, the State is allowing citizens to choose an education that best fits with their particular religious preferences. Applying the no-funding doctrine to the Ohio Scholarship Program would be fundamentally inconsistent with the substantive neutrality principle.

These examples indicate that, to advance the principle of substantive neutrality, the strict no-funding doctrine must be narrowly construed to reach only those programs, like the Virginia general assessment, that fund exclusively religious activities because of their religious quality for the purpose of facilitating religious indoctrination. Likewise, neither rejection of the Virginia general assessment nor the denial of funding for Catholic schools by the Native Protestant movement provides any precedent for using the no-funding doctrine to strike down the Ohio Scholarship Program.

D. The Existence of Private Choice Also Resolves Any Conflict Between the Neutrality and No-Funding Doctrines in this Case.

Apart from any explicit reliance upon the substantive neutrality principle, this Court has consistently relied upon the existence of independent private choice to resolve apparent conflicts between the no-funding doctrine and the formal neutrality doctrine. Such reliance

reflects "the hard task of judging – sifting through the details and determining whether the challenged program offends the Establishment Clause." *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring).

One such case was *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). The neutrality doctrine pointed towards upholding state funding of a blind man's seminary education; the no-funding doctrine pointed in the opposite direction. The Court resolved the conflict in doctrines "not by permitting one to trump the other, but by relying on the elements of choice peculiar to the facts of that case." *Rosenberger*, 515 U.S. at 848 (O'Connor, J., concurring).

One critical fact enabled the *Witters* Court to resolve the conflict and decide the case: the fact that the aid to religion was "the result of petitioner's private choice." *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in judgment). This Court emphasized that "vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice." *Id.* at 487.

Although the opinion of the Court discussed several additional factors supporting its conclusion, a majority of the justices stated in separate concurring opinions that the program was valid under *Mueller v. Allen*, 463 U.S. 388 (1983). *Witters*, 474 U.S. at 490 (White, J., concurring); *Id.* (Powell, J., concurring); *Id.* at 493 (O'Connor, J., concurring in part and concurring in judgment). In his *Witters* concurrence, Justice Powell summarized the rule in *Mueller* as follows:

> state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries.

Id. at 490-91 (Powell, J., concurring).

In *Mueller*, this Court upheld a state income tax deduction available for tuition, textbooks and transportation expenses incurred in sending children to private or public schools. This Court noted that where, as in the challenged tax deduction, "aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' . . . can be deemed to have been conferred on any particular religion, or on religion generally." *Mueller*, 464 U.S. at 399 (citation omitted).

This principle was also applied in *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993). In *Zobrest*, this Court upheld an aid program that provided intepreters for deaf children, including children attending religious schools. The decision relied to a significant extent on the determination that "a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." *Id.* at 10.

The tuition assistance in the Ohio Scholarship Program is indistinguishable in structure from the vocational assistance in *Witters*. In both programs, aid reaches religious schools only if and when the individual beneficiaries choose to attend such schools. Also, the aid is paid directly to the beneficiaries, who then endorse it over to the school of their choice. Likewise, as the foregoing analysis of this Court's cases indicates, the private choice

aspect of the Ohio Scholarship Program is indistinguishable from the private choice aspect of the tax deductions allowed in *Mueller* and the government-paid interpreter upheld in *Zobrest*.[19]

Finally, this Court has stated that there are "special Establishment Clause dangers . . . when money is given to religious schools or entities directly rather than, as in *Witters* and *Mueller*, indirectly." *Mitchell v. Helms*, 530 U.S. 793, 818-19 (2000) (plurality). It has been further stated that "the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition." *Id.* at 856 (O'Connor, J., concurring); *see also, Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668 ("[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.") The "sponsorship, financial support and active involvement" that was rejected under the Virginia general assessment bill involved direct monetary grants

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[19] In *Agostini v. Felton*, 521 U.S. 203 (1997), this Court upheld the provision of remedial education services to disadvantaged children attending sectarian schools. Although the structure of the program did not involve direct individual application by the students for the services, this Court concluded that "providing [the] services directly to eligible students [does not] result[ ] in a greater financing of religious indoctrination simply because those students are not first required to submit a formal application." 521 U.S. at 229. The private choice aspect of the Ohio Scholarship Program is more prominent than that under the program upheld in *Agostini* since the former program does involve direct application for benefits by the individual beneficiaries.

disbursed on religious criteria specifically to accomplish religious indoctrination. This is a far cry from the allocation of aid on secular criteria to accomplish secular objectives unrelated to religious indoctrination. Therefore, even if the Ohio Scholarship Program aid could in some sense be characterized as "direct funding" (notwithstanding the fact that the private choice of individual beneficiaries is essential to such aid reaching religious schools), the Program does not fall anywhere near "the original object of the Establishment Clause's prohibition."

III. This Case Is Not Governed By *Nyquist* Since The Structure Of The Program Is Distinguishable And *Nyquist* Cannot Be Squared With The Private Choice Line Of Cases.

In *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), this Court struck down a state tuition reimbursement program because it determined that the program had a "direct and immediate" effect of advancing religion. The Court's holding turned on the fact that the state only reimbursed parents for *nonpublic* school tuition and that approximately 85% of the nonpublic schools in the state were sectarian. *Id.* at 768.[20] Although the Court acknowledged that the aid reached religious schools only as a result of the private

[20] This Court also took notice of the possible sectarian characteristics of such schools, citing eight characteristics that could apply to some or all of the institutions. However, this Court gave no explanation of the significance of any of the characteristics, leaving the impression that such schools were simply too religious.

choices of individual parents, it stated that private choice alone was not sufficient to sustain the program. *Id.* at 781.

Nyquist does not justify affirming the lower courts' invalidation of the Program.

A. The Ohio Scholarship Program Is Distinguishable From *Nyquist* Because It Includes Both Public And Nonpublic School Options.

The *Nyquist* Court expressly distinguished the program at issue in that case from a program "involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions benefitted." *Id.* at 782 n.38. In *Mueller*, this Court held that the tax deductions at issue in the case fell within the exclusion set forth in *Nyquist* because the deductions were available for expenses incurred at both public and private schools. *Mueller*, 463 U.S. at 398. This Court observed that "state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." *Id.* at 399.

At the outset, it is important to recall that *all* Cleveland students are eligible for scholarships under the Program – not just those who are already attending nonpublic schools, as in *Nyquist*. Despite the availability of scholarships, Cleveland parents may choose to have their children remain in the Cleveland public schools. For such students, the Program makes tutorial assistance available. Further, the Program is open to public schools in neighboring school districts. Although in the initial years of the Program, a large percentage of children have redeemed their vouchers at private schools, this result is not appreciably different than the allocation of benefits in

Mueller, where private school tuition constituted the largest portion of the deductible expenses. *Id.* at 401.

B. The Distinctions Upon Which *Nyquist* Relies Should be Rejected.

In this Court's line of cases involving aid that reaches schools as a result of the private choices of individual beneficiaries, *Nyquist* stands alone as the only program struck down. Since the distinctions between *Nyquist* and the other cases are implausible or unprincipled, they should be expressly rejected.

One primary distinction, discussed above, is that the *Nyquist* program was only provided to parents sending their children to private schools. However, requiring the state to include public schools in a program where doing so would have no substantial impact, or where it would not further the legitimate secular objectives of the program, does not serve any Establishment Clause interest. This Court has recognized as much by refusing in *Mueller*, as discussed above, even to consider the fact that the vast majority of the tax deductions went to parents with children in private schools. Since the items for which expenses could be deducted (tuition, textbooks and transportation) were largely provided without cost to public school students, the inclusion of public schools in the program may have had no meaningful impact. In fact, this is precisely what the program opponents argued. *See Mueller*, 463 U.S. at 401. But the substance of the impact was not of concern to this Court, and properly so. Since Establishment Clause violations should not turn on the mere formality of a distinction without substance, this Court should expressly reject the proposition that all

school aid programs must be extended to public schools.[21]

The *Nyquist* decision also appears to suggest that the prevalence of sectarian schools selected by the program's beneficiaries has a bearing on the primary effect analysis. The opinion notes that the program sought to "assure that [parents] continue to have the option to send their children to religion-oriented schools," but then rejected the program because the choices made by parents were predominantly religious. *Nyquist*, 413 U.S. at 783. This proposition, which denies the right of individual beneficiaries to make their own religious choices, is clearly inconsistent with this Court's subsequent decisions in *Mueller* and *Witters*.

C. The Tuition Reimbursement Program in *Nyquist* Does Not Have the Primary Effect of Advancing Religion under This Court's Current Criteria.

In *Agostini*, this Court noted that the "criteria used to assess whether aid to religion has an impermissible effect" has changed in cases decided after 1985. *See*

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[21] The *Nyquist* court also incorrectly concluded that the program was skewed toward private schools because "[t]he grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools totally at state expense." *Nyquist*, 413 U.S. at 782, n.39. However, the converse could also be said: the right of parents of public schoolchildren to send their children to public school was given in addition to the right to receive tuition reimbursement for sending their children to private school. Put differently, all parents had the same options under state law: either send their children to public schools or select a private school and receive tuition reimbursement.

Agostini, 521 U.S. at 223. Three primary criteria are now used to "guide the determination of whether a government-aid program impermissibly advances religion: (1) whether the aid results in governmental indoctrination, (2) whether the aid program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion." *Mitchell v. Helms*, 530 U.S. 793, 845 (2000) (O'Connor, J., concurring) (citing *Agostini*, 521 U.S. at 234).

Under this new criteria, the program at issue in *Nyquist* does not have an impermissible effect. The aid does not define any recipients by reference to religion, nor does it create any additional entanglement between government and religion. The analysis of governmental indoctrination can be more complex. But *Agostini* makes clear that "the criteria by which an aid program identifies its beneficiaries [is relevant to assessing] whether any use of that aid to indoctrinate religion could be attributed to the State." *Agostini*, 521 U.S. at 230. In *Agostini*, this Court relied upon *Witters* and *Zobrest* to hold that the program at issue could not "as a matter of law, be deemed to have the effect of advancing religion through indoctrination." *Id.* at 226. Because the *Nyquist* program, like the aid programs in *Witters* and *Zobrest*, relies upon the genuine private choices of the individual beneficiaries to determine whether any aid reaches a religious institution, no religious indoctrination that may result can be attributed to the State.[22]

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[22] For the same reason, the program "cannot reasonably be viewed as an endorsement of religion." *Agostini*, 521 U.S. at 235. *See also, Witters*, 474 U.S. at 488-89 ("[T]he mere circumstance that an aid recipient has chosen to use neutrally available state aid to help pay for [a] religious education [does not] confer any message of state endorsement of religion.").

Similarly, the program does not "create a financial incentive to undertake religious indoctrination." *Id.* at 231. This Court noted that such an incentive is not present where the aid "is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* The program clearly meets these conditions. As with the programs challenged in *Everson, Board of Education v. Allen*, 382 U.S. 236 (1968), *Mueller, Witters, Zobrest* and *Agostini*, the *Nyquist* program makes it incrementally easier for parents to select a religious school, but only to the same degree that it makes it incrementally easier to select any private school. The incentive, if any, is to attend a private school, and the extent of benefit for religious schools follows solely from the fact that many parents choose private religious schools. This is not a preference with which the Establishment Clause is concerned, and if the government sought to squelch these preferences by eliminating religious school options, it would violate a fundamental purpose of the Establishment Clause: to maximize religious liberty by minimizing government influence on the religious choices of private citizens.

CONCLUSION

The central command of the Religion Clauses is that government should minimize its influence on religious belief and practice. The Ohio Scholarship Program satisfies this command by permitting Cleveland families to choose the extent (if any) to which the education of their children may include a religious component. Because the Program promotes accredited education, selects its beneficiaries without reference to religion and does not substantially influence any religious choices, the judgment should be reversed and the case remanded for entry of an order granting the petitioners' motion for summary judgment.

Respectfully submitted,

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APPENDIX A

Statements of Interest of *Amici Curiae*

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 140 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

The Center strives to preserve religious freedom in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides information to the public and the political branches of government concerning the interrelation of law and religion. Since 1980, the Center has filed briefs *amicus curiae* in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before the Supreme Court involving church/state relations.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive, Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right

sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . . "

The C an Legal Society's national membership, years of experience, and available professional resources enable it to speak with authority upon religious freedom matters before this Court.

The **Ethics & Religious Liberty Commission** is the ethics, moral concerns, and religious liberty agency for the Southern Baptist Convention, the Nation's largest Protestant denomination, with sixteen million members in over 41,000 autonomous local churches. The Commission is charged with addressing public policies affecting religious liberty domestically and abroad. We are profoundly concerned about the harmful effect that could result from government acts that discourage citizens from exercising educational choices for their children, whether those choices are secular or sectarian. We believe that the Establishment Clause should maximize religious liberty

by minimizing the influence of government on the religious choices of individuals.

Family Research Council, Inc. (FRC) is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family and religious liberty issues that affect the nation. FRC is committed to ensuring that the legacy of family, faith and freedom is not forgotten in America. FRC endorses parental involvement and parental choice in education and works to reduce the federal government's intrusion into local schools, including private and religious schools. FRC has participated in numerous *amicus curiae* briefs in the United States Supreme Court, lower federal courts, and state courts. Kenneth L. Connor is the President and Janet M. LaRue is the Senior Director of Legal Studies.

The **National Association of Evangelicals (NAE)** is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of American heritage.